No. 7023

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF OF APPELLANT.

I. M. PECKHAM,
United States Attorney,

A. C. WOLLENBERG,
Assistant United States Attorney,
Attorneys for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco.

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STATEMENT OF FACTS.

This is an action by a veteran of the World War, Sidney T. Burleyson, for the benefits of a policy of war risk insurance. Appellee Sidney T. Burleyson enlisted in the Marine Corps September 30, 1918, at which time he was granted $10,000. war risk insurance. He was discharged July 10, 1919, under a surgeon's certificate of disability for flat feet. His insurance lapsed for non-payment of premium due February 1, 1920. Appellee's contention is that the policy matured because he became permanently and totally disabled prior to the lapse thereof due to "fallen arches in both

of his feet, and which condition later developed into what is known as thrombo engitas obliterance" (Tr. p. 3).

The facts developed from the evidence at trial are as follows: immediately after enlistment the veteran suffered an attack of influenza and upon recovery departed from duty, while in the Port of Honolulu. He, after a short illness, had his appendix removed at the naval hospital at Pearl Harbor, at which place he also had his tonsils removed. The total hospitalization at that time was about thirty days (Tr. p. 14). After a period of light duty he again commenced drill and suffered severe pains in his legs from the knee down. This pain went into his feet and his arches fell and began to swell, the soles of his feet began to turn red. Within one week the arches fell from normal to completely flat. He was then surveyed out of the service by a Medical Board and discharged from Mare Island, California, September 10, 1919 (Tr. p. 15). At discharge the veteran signed a waiver stating no defects existed and that he was suffering from no disease or injury at that time. His testimony at the trial is that he was forced to sign this waiver by two officers at the Mare Island Hospital (Tr. p. 15). One week after discharge, on July 10, 1919, plaintiff went to work and from that time on we have the following industrial history, or work record (this we set forth herein in chronological order):

Started work at Mare Island, California, July 17, 1919, and worked continuously without interruption

until August 19, 1920, at a wage scale of $4.24 per day until December, 1919, and from that time until August, 1920, $3.84 per day (Tr. pp. 71-72).

On August 25, 1920, less than one week after leaving his employment at Mare Island, he was employed by the Southern Pacific Railroad in the dining-car service at Tracy, California, at $105. per month and found, for two weeks, and then transferred to Yuma, Arizona, at a wage of $115. per month and room, where he remained for nine months (Tr. pp. 85-86: 28-29). This was in June of 1921.

He was then employed at the Hotel Merritt, Oakland, as a room clerk for two months at $75. per month and found (Tr. p. 29).

His next employment was at the Hotel Del Monte in April of 1922 as a store clerk for two months at $70. per month and found (Tr. p. 30).

In July of 1922 he returned to the Southern Pacific Railroad Company, the dining-car service (Tr. pp. 85-86) working three months at Tracy, California, and four months, until April, 1923, at Imlay, Nevada, at a wage of $90. and found, and then at Bowie, Arizona, and Indio, California, at a wage of $90. a month and found. He then resigned from the Southern Pacific Railroad Company on September 2, 1923 (Tr. pp. 85-86).

On September 21, 1923, he was employed by the Emporium Department Store, San Francisco, where

he worked continuously until May 16, 1924, at $80. per month (Tr. pp. 87-88), During this period he attended Heald's Business College in San Francisco at night (Tr. pp. 88-89).

His next employment, as shown by the evidence adduced at the trial, was at the Fox Hotel, Taft, California, as a room clerk, commencing on January 1, 1925, and continuing until June 1, 1926, for a period of eighteen months at $125. per month (Tr. p. 32).

Upon leaving the Fox Hotel he was employed at Tahoe Tavern on Lake Tahoe for a period of three months as a room clerk from June, 1926, to September 30, 1926, at $125. per month and found (Tr. p. 90). At this time the Tahoe Tavern closed for the season and he was employed at the Whitcomb Hotel in San Francisco as a relief clerk for approximately two months at a wage of $90. per month and meals (Tr. p. 99).

Upon leaving the Whitcomb Hotel, appellee was employed for a period of two months at the Granada Hotel, San Francisco, at a wage of $75. per month and found (Tr. p. 34). On April 3, 1927, he entered the employ of the Worth Hotel in San Francisco, and continued there as a room clerk at a wage of $125. per month until August 15, 1928 (Tr. p. 100).

Appellee testified that over this period of time throughout the entire employment he was suffering from his feet, that they gave him pain and were occasionally covered with a red rash. However, the first

medical evidence offered at the trial was that of Dr. William Cooper Eidenmuller, who examined the appellee for the first time in the early part of 1927 (Tr. p. 50), while he was employed at the Worth Hotel, San Francisco, at which time this doctor made a diagnosis of thrombo angiitis obliterans, otherwise known as Berger's disease. This witness testified that in his opinion appellee was totally and permanently disabled at the time of his examination and prior to his discharge from the service (Tr. p. 55).

Lieutenant Frederick C. Kelly of the United States Medical Corps, stationed at the Letterman General Hospital, San Francisco, examined the appellee on January 7, 1932, and expressed the same opinion and considered him at the time of his examination totally and permanently disabled, however on cross-examination he stated (Tr. p. 45) that he could not tell whether or not appellee was permanently and totally disabled in July of 1919, unless he accepted as true the history given him by plaintiff, but he did not give any weight to the industrial history and work record that is outlined above. This witness stated that an individual was not permanently and totally disabled from the inception of this disease, and in this case he could not state when the inception of the disease occurred in Mr. Burleyson.

The other witnesses produced on behalf of the appellee were lay-witnesses, none of whom knew the appellee prior to the year 1927.

The government records introduced into evidence indicate the condition of flat feet prior to discharge and contains no information until December, 1926, when he reported to the Veterans Administration for the first time, and from that time on has been in contact with the Veterans Administration and the later few years a patient at government hospitals.

On behalf of the government Dr. Charles Ragle, physician of the Navy Department, who examined plaintiff at Mare Island in July of 1919 when he applied for a civil service position and was granted that position, testified as to the condition of plaintiff's feet and noted that the arches had fallen and were lower than normal, making a notation of about one-half inch drop in arches (Tr. p. 73). He passed appellee for civil service employment on July 14, 1919 (Tr. p. 74). Dr. P. J. Mangin, examining physician for the Southern Pacific Railroad Company (Tr. p. 80) and Dr. George R. Carson, also an examining physician for the Southern Pacific Railroad Company (Tr. p. 82), testified to their examinations and passed appellee for employment with that company, after giving the appellee a complete physical examination, of which proper records were made and preserved. As a result of passing these examinations, appellee was given employment and actually entered upon and continued the performance of his duties in each of these positions (Tr. pp. 85-86).

Lay-witnesses who were the employers of appellee, all testified to his work being satisfactory. Doctors

who examined appellee on behalf of the government at no time found him totally and permanently disabled and explained the condition existing in appellee as a progressive disease, the date of inception of which would be impossible to state.

Dr. Leo Eloesser (Tr. p. 108) stated that at the time of his examination on October 19, 1928, the subjective complaints might have induced him to suspect thrombo angiitis obliterans but the objective findings were all lacking upon which to make a definite diagnosis of that disease. He stated that at the time of the examination appellee was not totally and permanently disabled.

ASSIGNMENT OF ERRORS RELIED UPON.

Appellant relies upon the following assignment of errors contained in his assignment of errors (Tr. p. 127) as follows:

The District Court erred in denying defendant's motion for a directed verdict made at the close of all the evidence of the said cause upon the following grounds, to-wit:

(1) On the ground that the evidence in this case had not established a prima facie case for the plaintiff and was legally insufficient to sustain a verdict.

(2) On the ground that the evidence in this case proves conclusively that the allegations of the plaintiff's complaint have not been established, in that

plaintiff has been shown to have had continuous employment since the date of the lapse of his policy and in that there is no evidence whatsoever in the record that any condition of permanent and total disability existed during the period from the time of the lapse of plaintiff's policy up to the year 1926, and as to the period from 1926 to the date of trial, the evidence shows a partial disability.

ARGUMENT.

Our inquiry here is whether the jury's verdict of total and permanent disability at the date of the veteran's discharge, July 10, 1919, is based on substantial evidence. The burden is upon the plaintiff below to establish total and permanent disability while the policy was in effect.

United States v. Hill, 61 Fed. (2) 651 (C. C. A. 9);

Eggen v. United States, 58 Fed. (2) 616 (C. C. A. 8).

In this case the evidence is consistent with a hypothesis that the disability was not total nor permanent during the time that the policy was in force. By no stretch of the reasoning can the verdict of the jury herein be deemed consistent with the evidence adduced at trial.

In reviewing this evidence the first thing that strikes our attention is the long, continuous work

record and the substantial remuneration received for all of that employment. It is true that appellee was surveyed out of the United States Marine Corps with flat feet, but within one week of his discharge he was examined by Dr. Charles E. Ragle at the United States Navy Yard at Mare Island for civil service employment and accepted as a civil service employee. Dr. Ragle made an examination report to the Federal Civil Service Commission, which report is in evidence (Defendant's Exhibit No. 1). The employment at Mare Island Navy Yard, the result of this physical examination, in itself would controvert any claim of the plaintiff that he was totally and permanently disabled at that time. It is then quite significant that within five days of leaving his employment at Mare Island the veteran herein was examined for employment and accepted for employment by the Southern Pacific Railroad Company, and as a result of the examination by Dr. George E. Carson and Dr. P. J. Mangin, examining physicians of the Southern Pacific Railroad, he was employed by that company at salaries which it will be noted included in most cases board and room, in addition to the money received. Various hotel employments were as room clerk and many of them included either room or board, or both, in addition to the money received.

This employment record, therefore, is to be considered as continuous from July 17, 1919, when he started work at the Mare Island Navy Yard, to and including his employment at the Worth Hotel in San

Francisco, which employment he left on August 15, 1928.

The only testimony in evidence which would indicate a total and permanent disability is that expressed as an opinion by the plaintiff's doctors, none of whom saw or examined plaintiff prior to the early part of the year 1927.

It has been held by this court in the case of *United States v. Charles A. Kerr,* 61 Fed. (2) 800 (C. C. A. 9), that to prove total and permanent disability plaintiff must show by a fair preponderance of the evidence, impairment of capacity to carry on continuously a substantial, gainful occupation, which total impairment is reasonably certain to continue during life.

> "Totality and permanency are essential elements and must be established by substantial evidence and can not be found by speculation, surmise or conjecture."
>
> *United States v. Kerr,* supra.

> "Some substantial evidence must be presented to carry the case to the jury. The subsequent employment for the periods covered, in the absence of evidence of inability to work—not merely unemployment—and the nature of the injury complained of, refutes the idea that appellee was totally and permanently disabled at the date of discharge. United States v. Barker, 36 Fed. (2d) 556; United States v. Rice, 47 Fed. (2) 749; United States v. Harrison, 49 Fed. (2) 227;

United States v. LeDuc, 48 Fed. (2) 789; Ross v. United States, 49 Fed. (2) 541."

United States v. Kerr, supra.

THE EVIDENCE OF PLAINTIFF'S DOCTORS ALONE CAN NOT CONTROL THE VERDICT HEREIN.

It has been held that evidence which is contradictory to the physical facts or which is obviously false, is not substantial evidence.

United States v. Hill, C. C. A. 8, January 12th, 1933;

United States v. McGill, 56 Fed. (2) 522 (C. C. A. 8).

The verdict of the jury, although entitled to great weight, can not be founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts.

United States v. Hill, supra;

United States v. Kerr, supra;

United States v. Kims, 61 Fed. (2) 644 (C. C. A. 9).

This substantial continuous work record, whatever may have been the development of the veteran's disability, is such that he could not have been totally and permanently disabled within the definition of those

terms during the time he was engaged in his employments.

United States v. Kims, supra;
United States v. Seattle Trust Co., 53 Fed. (2) 435 (C. C. A. 9);
United States v. Rice, 47 Fed. (2) 749 (C. C. A. 9);
United States v. Harrison, 49 Fed. (2) 227 (C. C. A. 4);
Ross v. United States, 49 Fed. (2) 541 (C. C. A. 5);
Nalbantian v. United States, 54 Fed. (2) 63 (C. C. A. 7).

From any consideration of the plaintiff's occupation, whether it be considered a "light" or a "heavy" occupation, the fact remains that plaintiff was engaged continuously at an occupation. The burden was on him to show that that occupation was not a gainful one, and there is no evidence of a substantial nature, or otherwise, in the record to show that his occupations were not gainful.

United States v. Cornell, C. C. A. 8, January 14th, 1933.

The plaintiff has failed by his evidence to establish that his disability was total or permanent at any time, and that question is left entirely in the realm of speculation and conjecture.

We therefore contend that the motion of the government for a directed verdict in its favor should

have been granted, and that the judgment of the court below must be reversed.

Respectfully submitted,

I. M. PECKHAM,
United States Attorney,

A. C. WOLLENBERG,
Assistant United States Attorney,
Attorneys for Appellant.